No. 627. Sup. Ct.
Brief of Russell for Appellee
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STEAMSHIP "CHATTAHOOCHEE."

ABRAM W. HENDRY ET AL.,
Appellants, Petitioners,

vs. 627.

THE OCEAN STEAMSHIP COMPANY,
Respondents.

ANSWER OF THE OCEAN STEAMSHIP COMPANY TO THE PETITION OF ABRAM W. HENDRY ET AL. FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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BOSTON:
NATHAN SAWYER & SON, PRINTERS,
No. 70 STATE STREET.
1896.

Supreme Court of the United States.

THE "CHATTAHOOCHEE."

ABRAM W. HENDRY ET AL.

vs.

THE OCEAN STEAMSHIP COMPANY.

ANSWER OF THE OCEAN STEAMSHIP COMPANY, CLAIMANT AND LIBELLEE, TO THE PETITION OF THE LIBELLANTS FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

THE petition arises from a libel in admiralty in the United States District Court for Massachusetts by petitioners as owners of the schooner "Golden Rule" against the steamship "Chattahoochee" for collision between the two vessels and the consequent sinking and total loss of the schooner and cargo of sugar and molasses in the fog some eighteen miles southeast of Nantucket South Shoal Lightship about four o'clock in the morning of July 20, 1894. The pleadings raise the usual issues in a fog collision, — each vessel charging the other with immoderate speed, want of lookout, and improper navigation.

The case was heard in the District Court upon full proofs in oral evidence or depositions, all material witnesses being examined. The Court after due consideration decided that each vessel was in fault, — the steamship for going at an immoderate rate of speed in the fog, and the schooner for the

same fault. The other alleged faults were not passed upon, as it was unnecessary to consider them. The steamship was ordered to pay in full for the loss of the cargo on the schooner, and was then allowed to recoup and deduct one-half of such amount so paid from one-half of the value of the schooner and freight lost, and to pay to the owners of the schooner the balance remaining. (Final Decree, Record, pp. 9–11.) The steamship was uninjured, and, upon the finding of mutual fault, was held, as above, under the rules of damage recognized in such cases in the equity of our admiralty practice. The opinion of the judge of the District Court (NELSON, J.) is published in the Record (pp. 137–139). The final decree is in the Record (pp. 9–11).

These petitioners, representing the schooner, appealed in due form to the Circuit Court of Appeals for the First Circuit. No appeal was taken in behalf of the steamship. The record was then made up and printed, containing all the evidence produced at the trial in the District Court. No additional evidence was taken upon either side. The libellants simply exercised their legal right of presenting their evidence and arguments to the appellate court. The case was there argued orally and upon elaborate briefs upon each side. Every question of fact or law was presented and argued. There is no pretence that the Circuit Court of Appeals did not fully hear, consider, and appreciate all the issues involved. In a lengthy and learned opinion by PUTNAM, J., for the Court, these issues of fact and law, so far as they were deemed pertinent, were thoroughly discussed and decided, and the decree of the District Court affirmed. The opinion is reported as an authoritative and unanimous opinion of the Court.

The *Chattahoochee*, 74 Fed. Rep. 899.

But the libellants now desire by this form of proceeding to appeal to the United States Supreme Court and again argue

the same record, at least, the issues of law discussed and led in the courts below, within their exclusive statutory diction. The only ground for the unusual claim is that courts erred in the decision.

I.

he respondents object that the case is not a proper one for grant of the exceptional writ of *certiorari* merely for the pose of further appeal and argument of the cause. It was manifest intention of the Act of March 3, 1891, to relieve Supreme Court from the necessity of hearing admiralty eals, by confining the appellate jurisdiction in admiralty ses to the Circuit Court of Appeals. If *certiorari* be granted equest of an aggrieved party, then the appellate jurisdiction he Supreme Court still continues, and the only change made the statute is in the method of invoking it. We understand t this Court regards the assumption of such jurisdiction as ceptional and discretionary, and imposes upon the petitioner burden of showing a case within the exception. Mr. Justice AY, in *American Construction Co.* vs. *Jacksonville Railway*, 3 U.S. 372, 383, expressed the opinion of the Court: "The hority conferred on this Court by the very provision on ich the petitioners mainly rely, by which it is enacted that, any such case, as is hereinbefore made final in the Circuit urt of Appeals, it shall be competent for the Supreme Court require, by *certiorari* or otherwise, any such case to be rtified to the Supreme Court for its review and determination th the same power and authority in the case as if it had been rried by appeal or writ of error to the Supreme Court,' has en held to be a branch of its jurisdiction which should be

exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision. . . . Accordingly, while there have been many applications to this Court for writs of *certiorari* to the Circuit Court of Appeals under this provision, two only have been granted, the one in *Lau Ow Bew's Case*, 141 U.S. 583, which involved a grave question of public international law affecting the relations between the United States and a foreign country; the other in *Fabre, Petitioner*, No. 1237 of the present term, an admiralty case which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the district judge, and was dissented from by one of the three circuit judges; and in each of those cases the Circuit Court of Appeals had declined to certify the question to this Court."

And see

In re Wood, 143 U.S. 202.

II.

The first grievance of the petitioners is the finding of law and fact (both necessarily involved) of both the Courts below that the schooner "Golden Rule" was not at the time going at a moderate speed in the admitted fog.

This decision involved mainly a consideration of the facts and circumstances, and involved no novel or peculiar interpretation of the rules of navigation of sufficient consequence to call for the exceptional interposition of this Court by the extraordinary

writ of *certiorari*. The question was, What was, under the circumstances, the proper application of the Rule of Navigation, Article 13 (Act of March 3, 1885)? The rule is explicit in requiring a sailing-vessel in fog to go at a moderate speed.

This Court has decided that a speed of six knots an hour for a steamship is immoderate. "Under such circumstances, and in such a fog that vessels could not be seen more than a quarter of a mile away, it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerage way, which the Court finds in this case to be three miles an hour." — (Mr. Justice BROWN.)

> The *Martello*, 153 U.S. 64, 70.
> *Nacoochee*, 137 *Id.* 330.
> *Colorado*, 91 *Id.* 692.

The authorities are agreed — and so far as is known to these respondents without question or dissent — that the same rule of fog speed applies to sailing-vessels that this Court has applied to vessels under steam. The character of the motive power is immaterial in judging of compliance with the statute requirement of "moderate speed."

Spencer, in his recent work upon "Collisions," Sect. 50, sums up the law: —

"Ordinary prudence and good seamanship alike require a sailing-vessel navigating in foggy weather to go at a moderate rate of speed, and to use all possible precautions against collisions by making some sort of detonating signal, whereby other ships may be apprised of its presence and situation; and this, irrespective of any rule on the subject, especially in a thoroughfare where other vessels may be expected to pass. A high rate of speed in a dense fog is less justifiable in a sailing-ship than in one propelled by steam, as she has less facilities for quickly stopping and changing her movements. The rule of moderate

speed is enforced with the same or a greater degree of strictness in the case of sailing-vessels than in the case of steamships. They must reduce their speed when occasion demands, or abide the consequences of a failure to do so. Circumstances so unusual as to justify a sailing-vessel from taking the ordinary precautions to guard against collision by reducing speed, using a fog horn, or complying with other statutory requirements, would exonerate a steamer for violating the same rules under like circumstances."

The reason for the requirement is stated by Judge BROWN in the N.Y. District Court.

The *Rhode Island*, 17 Fed. Rep. 554, 559.

"And if the navigation of a sailing-vessel, as regards speed, is such that it must be held careless or reckless in reference to her duty to other sailing-vessels which she is likely to meet, it must be held careless and faulty in reference to steamers also, though the latter are bound to keep out of the way; for there cannot be two diverse rules as to prudence in navigation, applicable to the same vessel in the same situation; nor, as I have said above, was the rule requiring steamers to keep out of the way designed to encourage careless or reckless navigation in sailing-vessels, or to sanction a rate of speed as against steamers, which, as against sailing-vessels, must be condemned. To permit this would be to permit sailing-vessels to take advantage of the obligation imposed on steamers to go at moderate speed, and to keep out of the way, and increase the difficulties of steamers in doing so. To allow sailing-vessels to increase their own speed as that of steamers is diminished would tend directly to thwart the very object of the rule requiring moderate speed, — viz., to secure sufficient time to avoid collision, — and it would thus convert a rule designed to insure greater safety into an occasion of greater danger. The duty of steamers to keep out of the way is a correlative one, and presupposes that the

sailing-vessel shall observe not only all the specific statutory rules, but all other general obligations of prudence and caution in navigation which the special circumstances demand. Among the latter must certainly be embraced a moderate rate of speed at night and in a fog, in a thoroughfare where numerous steamers and other vessels must be expected to be met; and a speed which is held immoderate for a steamer under such circumstances cannot be held moderate or permissible for a schooner."

And see, —

The *Johns Hopkins*, 13 Fed. Rep. 185.
Vesper, 9 *Id.* 569.
Wyanoke, 40 *Id.* 702.
Louisiana, 2 Benedict, 371.
Chancellor, 4 *Id.* 153.

The English authorities (and the "Golden Rule" was a British schooner subject to their jurisdiction) are equally clear.

"The object of the rule is this: That when a fog comes on it is the duty of the ship, whether she be a sailing-vessel or a steamer, to moderate her speed as much as she can, yet leaving herself with the capacity of being properly steered." — (Sir J. HANNEN.)

The *Zadok*, 9 P. D. 114, 117.
Beta, *Id.* 134.
Dordogne, 10 *Id.* 6.
N. Strong (1892), Probate, 105.

Unless this Court thinks doubtful the interpretation of the Rule of Navigation regarding speed in fog, made alike by the tribunals in this country and in England, there is no exceptional question regarding speed raised in the Record in this case.

The question is one frequently before the Courts, and is

mainly one of fact: What is moderate speed at the place and time and under the circumstances? So far as the question in this case was one of fact, the finding of the Court below is final. That Court found upon the facts: "The schooner was under all sail except the lower half of her square sail. Her rig gave her a very large spread of canvas which made her fast on the course she was sailing. She was practically free, and her master admits that she was making between five and six knots. Other witnesses claim more. However this may have been, it is very plain that she was making substantially all the speed she was capable of, and that she could easily have shortened sail materially when she struck the fog, and yet have kept her steerage way, and all the way necessary for all manœuvres which could reasonably have been anticipated." — (PUTNAM, J.)

The *Chattahoochee*, 74 Fed. Rep. 901–902.

Again, later in the opinion, Judge PUTNAM says: "The current of the decisions fails to justify the 'Golden Rule' in proceeding with practically all sail set after she entered the fog, and even after she heard the fog horn." — (*Id.*, p. 903.)

It is submitted that it is difficult, if not impossible, for this Court to review a decision upon moderate speed without examining and passing upon the facts regarding the circumstances. The Courts carefully refuse to establish an arbitrary rate of speed in the fog. It must be determined in each case upon the facts. Even before the Act of 1891 creating the Circuit Court of Appeals, this Court had no jurisdiction in admiralty appeals over questions of fact.

To illustrate the difficulty, attention is called to some facts claimed to be proved by the evidence.

1. The place of collision was not the open ocean, but the confined passage known as the "outside passage," between Nantucket and the Banks. It is the only route in addition to

the "inside passage" through Vineyard Sound for vessels between Boston and ports south of Cape Cod. The place was eighteen miles south of the Nantucket South Shoal Lightship. The fact that this steamship, on the regular line from Boston to Savannah, was using this passage, and was then only twelve hours from Boston shows that the place of collision was frequented water. There is no claim that she was out of her course.

2. While the Court refers to the admission of the master of the schooner that he was going five or six knots, his evidence shows an admission by him of seven knots. *Int.* "What were you reckoning your speed to be when you looked at your chart?" *Ans.* "About seven knots." (See cross-examination of Capt. Page of the schooner, Record, Ints. 201–206, p. 29.) His lookout, Williams, says the schooner was going seven and a half or eight knots. (Williams, Ints. 113–114, Record, p. 77.)

3. The evidence is undisputed that the schooner, getting into the fog about three o'clock, made no attempt to lessen sail or lower speed. She continued under substantially full sail.

It is submitted that unless this Court will examine the evidence and settle the facts regarding the navigation of the schooner, it cannot review or decide the question of moderate speed. Such question is not an abstract question of law or one that for the purpose of precedent can be decided apart from the contentions as to the facts. The learned counsel for petitioners apparently recognize this necessity by the discussion and reference to evidence upon pages 3–7 of the printed Petition submitted by them. The alleged question of law cannot be separated from the questions of fact, and over the latter this Court will not take jurisdiction.

III.

The second reason alleged for the grant of the writ of *certiorari* is the decision of the Circuit Court of Appeals that, in settling the amount to be paid to the owners of the schooner, the steamship could recoup and deduct one-half of the amount paid by the latter for loss of schooner's cargo. The final decree (Record, pp. 9–11) gave cargo $17,215.17. The value of schooner, freight, etc., was $18,410.90. By recouping one-half the value of cargo ($8,607.58) from one-half the value of schooner and freight ($9,205.45), the balance decreed as due from the steamship to the libellants as owners of the schooner is $597.87.

1. The petitioners claim that the Act of Congress (chap. 105, Act of February 13, 1893), commonly known as the Harter Act, has changed the rule of equal division of damages in collision causes, where there is mutual fault, and that, under it, the Court should hold that this steamship should pay in full for the loss of cargo, and, in addition, one-half the value of the schooner, without recoupment. In other words, although both vessels were in equal fault, and guilty of the same fault, the steamship should bear three-fourths of the damage, and the schooner only one-fourth.

The Circuit Court of Appeals refused to give the requested construction and application to the Harter Act, but held that as between two vessels, both tort feasors, the rule of division of the damages affirmed in

The *North Star*, 106 U.S. 17,

still applied.

It is submitted that the Harter Act does not change the equity of equal division of loss between two offending vessels. That Act relates simply to the contractual relations between a cargo and its carrier. It has no application to an outside third party. The Act, in effect, substitutes a statutory for a contract bill of lading. It does not affect the tort liability for damage done by another vessel. This steamship gains no benefit from any contract or statute exemption existing between the schooner and her cargo. Nor does the schooner acquire any added right as against the steamship by reason of such exemption. The joint damage done by the mutual fault is adjusted (so far as the steamship is concerned) as between the two vessels, not as between the schooner and her cargo. The relation of that cargo to the schooner no more concerns the steamship than does the question whether the cargo or schooner was protected by insurance, by English Exempting Bill of Lading, or by the Limited Liability Act of 1851. The question before the Court was not, what did the steamship owe the cargo, but what in equity did she owe the schooner?

The opinion of the Court expressly recognizes and follows the recent opinion of this Court in

The *Delaware*, 161 U.S. 459,

where this Court held that the Harter Act merely affects the relative rights existing between a vessel and her cargo, and "the statute does not affect the liability of a vessel to other vessels with which she may come in collision."

Mr. Justice BROWN said: "The act was an outgrowth of attempts made in recent years to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability which had been held by the Courts of England, if not of this country, to be valid as contracts, and to be respected

even when they exempted the ship from the consequences of her own negligence. . . . These provisions (of the statute) have no possible application to the relations of one vessel to another, and are mainly a re-enactment of certain well-known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes. The fact, too, that by Section 6 the various sections of the Revised Statutes which embody the Limited Liability Act are preserved unimpaired would seem to indicate that the later act was not intended to receive the broad construction claimed."

2. The petitioners claim that the decision regarding the Harter Act differs from other decisions in some of the inferior federal courts. It is true that Judge PUTNAM in the opinion says that "we are not prepared to determine that its benefits were intended to extend to foreign vessels." This is mere *dicta in arguendo*, as the decision was based upon the case of the *Delaware*, *supra*, and did not require a decision upon the application of the Act to a foreign vessel. Assuming that the Act did apply to such a vessel, it still did not affect the relative rights of two vessels in mutual fault for collision in the adjustment as between them of the collision loss. The cases cited upon the eighth page of the Petition are not contrary to the decision in this case. They are all cases in which the question of liability under the Act was wholly between the carrying vessel and her cargo. The question of the rights of a foreign ship under the Act is immaterial to the case as considered and decided by the Circuit Court of Appeals.

The *Etona*, 64 Fed. Rep. 880.
Florence, 65 *Id.* 248.
Silvia, 68 *Id.* 230.
Carib Prince, *Id.* 254.

IV.

The remaining complaint of the petitioners is the refusal of the Circuit Court of Appeals to hold that the speed of the schooner, even if immoderate, was not material and did not contribute to the collision.

We submit two answers to this proposition: —

1. The proposition involves purely questions of FACT and examination of evidence outside the jurisdiction of this Court. The decision must necessarily involve a consideration of the relative approach of the two vessels; of the distance apart when discovered; of the subsequent manœuvring or failure to manœuvre of each, — all questions upon which much evidence was taken, and elaborate argument made in the lower Court. This Court is called upon to examine the record of this evidence, weigh the probabilities, and draw the proper inferences, merely to decide whether the two inferior Courts erred in their consideration of the evidence submitted upon these issues of fact.

2. It would be almost, if not quite, impossible to find that the speed of an approaching vessel does not contribute to a resulting collision. Certainly if such vessel had been going at a slower rate she would not at the time have reached the point of collision.

The following points were made and argued in behalf of the steamship, and are urged here if the Court consents to examine the questions of fact.

(*a*) The immoderate speed of the schooner prevented the steamship from swinging clear under the port wheel.

(*b*) It caused the schooner to overtake the steamship, notwithstanding the latter's swing to starboard, and to get under the bows.

(*c*) It prevented the steamship from hearing and locating the fog horn earlier and more frequently.

WHEREFORE the Ocean Steamship Company prays this Honorable Court to *dismiss* the Petition for a writ of *certiorari* with costs.

OCEAN STEAMSHIP COMPANY,

BY ITS PROCTOR,

CHARLES THEODORE RUSSELL.